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No. 112, Original

In The

Supreme Court of the United States

October Term, 1987

STATE OF WYOMING,

Plaintiff,

v.

STATE OF OKLAHOMA,

Defendant.

MOTION OF ALABAMA POWER COMPANY, A CORPORATION, FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE COMPLAINT AND AMICUS CURIAE BRIEF

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MOTION OF ALABAMA POWER COMPANY, A CORPORATION, FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE COMPLAINT

Alabama Power Company, a corporation, (hereinafter, APCo) respectfully moves this Court, pursuant to Rule 36.1, for leave to file the accompanying brief in this case as amicus curiae. The attorney for the Plaintiff State of Wyoming consents to the filing of an amicus curiae brief, and his letter of consent is attached to the original, signed copy of this motion. The attorney for the Defendant State of Oklahoma refuses to consent to this filing.

This action seeks to invalidate an Oklahoma law (hereinafter, the Act) that requires utilities generating and selling electricity in Oklahoma to burn a mixture containing a minimum of ten percent Oklahoma-mined coal in their coal-fired generating plants. APCo is an electricity-producing utility that purchases coal on the interstate market. As a purchaser of coal in the interstate market, and as a producer of electricity from coal-fired plants, APCo has an interest in this Court determining the constitutionality of Oklahoma's attempt to interfere by way of legislation, for reasons unrelated to legitimate state goals such as health or safety, with the operations of the interstate coal market and of privately owned utilities.

The Plaintiff's brief in support of its motion for leave to file a complaint argues that the Act violates the Commerce Clause of the Constitution of the United states. APCo contends, on the basis of the factual

allegations of Wyoming's complaint, that the Act also violates the Fourteenth Amendment's Equal Protection Clause, and that, unless this motion is granted, the Court may not be alerted to this serious and potentially dispositive argument in the course of deciding whether to accept jurisdiction in this case. APCo's interest in this dispute underscores the seriousness and dignity of Wyoming's complaint, and its brief supports Wyoming's invocation of this Court's exclusive and original jurisdiction. If the Court accepts APCo's argument, the Oklahoma statute at issue in this case must be declared unconstitutional.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE

INTEREST OF ALABAMA POWER COMPANY

The Plaintiff State of Wyoming seeks leave to challenge the constitutionality, under the Commerce Clause, of an Oklahoma statute, *Okla. Stat.* tit. 45, §§ 939, 939.1 (Supp. 1986) (hereinafter, the Act).[1] The Act requires Oklahoma utilities that produce electricity from coal-fired plants for sale to Oklahoma consumers to burn a fuel mixture containing at least ten percent coal mined in Oklahoma. Utilities covered by the Act may not pass cost increases along to their consumers.

Alabama Power Company (hereinafter, APCo), a privately owned, state-regulated utility, has a significant and legitimate interest in securing a judicial determination of the constitutionality of any statute that requires, without reference to such legitimate state ends as health and safety, that a utility must use coal originating in a particular state and, concomitantly, that coal from other states may not be used. APCo also has statutory obligations to provide adequate service to its customers and to manage its operations in an efficient and economical manner. (Appendix A - I). These obligations give APCo an additional significant and legitimate interest in determining the constitutionality of statutes that threaten to artificially constrain APCo's business operations, and which are potentially contrary to the interests of its consumers. APCo's interest in this case is made all the more real by

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[1] The text of the Act as codified is found at *Plaintiff's Brief* Appendix A-1.

the fact that legislation effectively similar to the Act was recently introduced in both houses of the Alabama Legislature (Appendix A - II). Although the legislation failed to pass, APCo is concerned that attempts to enact similar legislation will be made in the future unless the unconstitutionality of such state regulations is established.

APCo is particularly wary of the consequences of allowing the Act to survive and similar state laws to proliferate. If Oklahoma can tell utilities in that State that they must obtain at least ten percent of their coal from Oklahoma sources, it can also require the utilities to satisfy fifty or one hundred percent of their coal needs from Oklahoma mines. What Oklahoma can do, other states, too, can do. The Oklahoma Act presents the specter of an epidemic of similar enactments by other states, with each act requiring privately owned regulated businesses that operate or sell in that state to purchase designated amounts of goods and services from suppliers within that state.[2] Such a situation would seriously threaten the federal structure of our national government, because rights would be given or

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[2] In fact, Arkansas recently imposed a quota on utilities in that State similar to Oklahoma's Act. *See* 1987 *Ark. Acts* 553. (Appendix A - VII). The Arkansas law requires coal-fired electricity plants to burn three percent Arkansas-mined coal in 1988, six percent in 1989, and ten percent from 1990 on. Similar laws may be under consideration in Kansas and Missouri. *Plaintiff's Brief* at 17.

denied on the basis of state citizenship rather than national citizenship.[3]

APCo submits this brief to supplement the legal arguments presented in the Plaintiff State of Wyoming's Brief in Support of its Motion for Leave to File a Complaint. APCo fully supports Wyoming's motion and concurs in the arguments presented in Wyoming's brief.

SUMMARY OF ARGUMENT

The purpose of the Oklahoma Act is to promote the economic development of Oklahoma's coal industry at the expense of coal producers in other states. The Act's discriminatory purpose is not a legitimate state objective under the Equal Protection Clause. This is an appropriate case for the Court to exercise its original jurisdiction. Because the Act so directly affects its sovereign interest, the State of Wyoming has *parens patriae* standing to challenge the Act on behalf of its citizens.

[3] Conceivably, the juxtaposition of conflicting requirements imposed by different states could even force APCo to halt interchanges of electricity with utilities in other states. This result would impose a significant hardship, to say the least, on APCo.

ARGUMENT: REASONS FOR GRANTING PLAINTIFF'S MOTION FOR LEAVE TO FILE A COMPLAINT.

A. The Oklahoma Act Violates the Equal Protection Clause.

Traditionally, this Court has tested state economic regulations for soundness under the Equal Protection Clause by inquiring whether a challenged regulation fosters a legitimate state purpose, and, if so, whether the classification imposed by the regulation is rationally related to that purpose. *E.g. Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648, 667-68 (1981). The Oklahoma Act cannot withstand this inquiry.

The Act's text leaves no possibility for speculation about its purpose: it is intended to create a domestic market for Oklahoma coal producers at the exclusion of coal producers in other states. The resolution entitled "Mines and Minerals – Coal – Domestically Produced Coal" (hereinafter, the Resolution), and passed by the Oklahoma Legislature in 1985, supports this interpretation of the Act's purpose.[4] The Resolution asked Oklahoma utilities to mix ten percent Oklahoma coal with the Wyoming coal used by the utilities in their coal-fired plants.

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[4] The Resolution is reprinted at Appendix A-11 to the Plaintiff's Brief. In addition, see *Plaintiff's Brief* at 14-16 & nn. 18-21, which show that the purposes stated in the Resolution can be fairly ascribed to the Act, because both were products of the same campaign to promote Oklahoma's coal industry at the expense of Wyoming's.

The stated purpose of this request was to "keep[] a portion of ratepayer dollars in Oklahoma and [to] promot[e] economic development" within the State. The Resolution specifically acknowledged the Legislature's intent to foster economic development in Oklahoma by siphoning off money that otherwise would have gone to Wyoming coal producers and Wyoming citizens in the form of payments for coal and severance taxes.

In the same year that Oklahoma's Legislature passed the Resolution, this Court held that a discriminatory purpose like that behind the Resolution "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 878 (1985). *Ward* involved a preference tax which discriminated in favor of insurance companies located in Alabama at the expense of insurance companies located outside of the State. *Ward*, 470 U.S. at 871. The statute taxed the domestic insurance companies at rates below those paid by the foreign insurance companies. *Ward*, 470 U.S. at 871. The foreign companies challenged the statute under the Equal Protection Clause. *Ward*, 470 U.S. at 872. In response, the State of Alabama attempted to justify the preference tax as a valid effort to promote domestic industry and to encourage investment within the State. *Ward*, 470 U.S. at 873. This Court held that Alabama's discriminatory purpose in enacting the statute violated the Equal Protection Clause:

> In whatever light the State's position is cast, acceptance of its contention that promotion of

> domestic industry is always a legitimate state purpose under equal protection analysis would eviscerate the Equal Protection Clause in this context. A State's natural inclination frequently would be to prefer domestic business over foreign. If we accept the State's view here, then any discriminatory tax would be valid if the State could show it reasonably was intended to benefit domestic business.
>
> . . . .
>
> *We hold that under the circumstances of this case, promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose.*

Ward, 470 U.S. at 882. (emphasis added) (footnote omitted).

Ward is within the mainstream of this Court's equal protection jurisprudence. In *Ward*, the Court found that in the earlier case of *Western & Southern*[5] it had relied on a line of cases to "reaffirm[] the continuing viability of the Equal Protection Clause as a means of challenging a statute that seeks to benefit domestic industry within the State only by grossly discriminating against foreign competitors." *Ward*, 470 U.S. at 879. In addition, the Court "always has held that the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening 'the residents of other state members of our federation.' " *Ward*, 470 U.S. at 878 (quoting *Allied Stores of Ohio. Inc. v.*

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[5] The Court's decision in *Western & Southern* was central to the presentation of issues and the Court's holding in *Ward*. *Ward*, 470 U.S. at 873-75.

Bowers, 358 U.S. 522, 533 (1959) (Brennan, J., concurring)).

Ward governs the equal protection analysis of this case. No less than the discriminatory statute in *Ward*, the Act in this case imposes a classification that discriminates on the basis of residence: Oklahoma coal producers benefit by the Act merely by virtue of their being domestic producers; producers in Wyoming suffer simply because they are foreign to Oklahoma. *See Plaintiff's Brief* at 18 n.23. In this case, as in *Ward*, the state legislature enacted discriminatory legislation for the purpose of developing the State's economy solely by burdening the economies of other states. Consequently, Wyoming coal producers have been excluded from ten percent of the Oklahoma market for fuel for coal-fired plants. As a direct result of this exclusion, the citizens of Wyoming have been deprived of at least nine million dollars annually of the severance taxes that would have been paid to them but for the Oklahoma Act. *Plaintiff's Brief* Appendix A-11,12; *Plaintiff's Brief* at 18. *Ward* shows that under the circumstances of this case, the purpose behind Oklahoma's Act violates the Equal Protection Clause's prohibition of "home team" legislation. *Ward*, 470 U.S. at 878. Oklahoma's Act, therefore, must be struck down.[6]

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[6] In *Ward*, because of the procedural posture of the case when it reached the Court, the Court's holding did not extend to the second part of the rationality test, *e.g.*, determining whether the statute's method was rationally related to its end. *See Ward*, 407 U.S. at 874. However, in *Ward*, as

(Continued on following page)

B. The Court Should Assume Original And Exclusive Jurisdiction.

The validity of the Act, which is aimed at and injurious to the citizens of Wyoming, constitutes a justiciable controversy that warrants the exercise of this Court's original and exclusive jurisdiction. The appropriateness of original jurisdiction in this case is enhanced by the manner in which the Act subverts our federal structure by placing one State's economic interests over the economic interests of the other states. *See Maryland v. Louisiana,* 451 U.S. 725, 739-40 (1981) (regarding appropriateness of original jurisdiction); *see also Allied Stores of Ohio, Inc. v. Bower*, 358 U.S. 522, 532-33 (1959) (Brennan J., concurring) (discussing the Equal Protection Clause as an instrument of federalism) (cited in *Ward*, 470 U.S. at 878). Amicus has discussed in its Statement of Interest the consequences if other states were to enact laws similar to Oklahoma's. Given the possibility of such a result, the Plaintiff's complaint presents a controversy of importance that calls for the exercise of this Court's original jurisdiction. *See Pennsylvania v. West Virginia,* 262 U.S. 553, 596 (1923).

C. Plaintiff Has Parens Patriae Standing.

Plaintiff has standing as *parens patriae* to protect the people of Wyoming from the substantial economic

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(Continued from previous page)

in this case, there was no need to proceed to the second part of the rationality analysis, because no method of accomplishing a state goal can salvage the illegitimate goal of promoting "domestic business by discriminating against nonresident competitors." *Ward,* 470 U.S. at 882.

injury visited upon them by the Oklahoma Act. *See Maryland v. Louisiana*, 451 U.S. at 737. The Oklahoma Act aims to injure Wyoming's coal industry in order to strengthen Oklahoma's. The Plaintiff's Brief ably demonstrates that the economic health of Wyoming's coal industry and the economic health of her people are tightly intertwined. *Plaintiff's Brief* at 12-15, 22-24. Oklahoma's Act will, at the very least, deprive the people of Wyoming of funds necessary for maintaining and building highways, developing and managing water sources, and assisting local governments in the construction of schools and other public projects.

The Act can also reasonably be expected to cause unemployment among Wyoming's miners and in businesses that service the coal industry. Consequently, it will cause a decrease in revenues from taxes that otherwise would have been paid by the newly unemployed, and an increase in the costs of unemployment and other state benefits that must be paid by Wyoming as a result of increased unemployment. Moreover, the injury inflicted by the Act is a permanent one that will grow in its harm to Wyoming's citizens as the demand for electricity in Oklahoma increases over time. In all of these ways, the Act implicates Wyoming's sovereign interests and gives it *parens patriae* standing. *See Pennsylvania v. New Jersey,* 426 U.S. 660, 665 (1976).

CONCLUSION

The questionable constitutionality of the Oklahoma Act, the injury that the Act has inflicted upon the people of Wyoming, and the unfairness of economic regulations that favor the "home team" lead to the conclusion that Plaintiff's motion for leave to file the proposed Complaint should be granted.

Respectfully submitted,

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APPENDIX

ALA. CODE § 37-1-49 (1975)

§ 37-1-49. Duty of utility to render adequate service and maintain facilities.

Every utility shall maintain its plant, facilities and equipment in good operating condition and shall set up and maintain proper reserves for renewals, replacements and reasonable contingencies. Every utility shall render adequate service to the public and shall make such reasonable improvements, extensions and enlargements of its plants, facilities and equipment as may be necessary to meet the growth and demand of the territory which it is under the duty to serve.

ALA. CODE § 37-1-80 (Supp. 1987)

§ 37-1-80. Rates to be just and reasonable; right of utility to earn fair net return.

The rates and charges for the services rendered and required shall be reasonable and just to both the utility and the public. Every utility shall be entitled to such just and reasonable rates as will enable it at all times to fully perform its duties to the public and will, under honest, efficient and economical management, earn a fair net return on the reasonable value of its property devoted to the public service. For the purpose of fixing rates, such reasonable value of a public utility's property shall be deemed to be the original cost thereof, less the accrued depreciation, as of the most

recent date available. In any determination of the commission as to what constitutes such a fair return, the commission shall give due consideration among other things to the requirements of the business with respect to the utility under consideration, and the necessity, under honest, efficient and economical management of such utility, of enlarging plants, facilities and equipment of the utility under consideration, in order to provide that portion of the public served thereby with adequate service.

SENATE BILL 243 AND HOUSE BILL 175, 1988 REGULAR SESSION OF THE ALABAMA LEGISLATURE.

SYNOPSIS: This bill amends Section 37-1-80, Code of Alabama 1975, relating to rates charged by public utilities, so as to provide a procedure to be used by the Public Service Commission to determine if the purchase of out of state or foreign coal will alter an electric utility's rates and to prohibit the use of foreign coal to serve certain state facilities.

A BILL
TO BE ENTITLED
AN ACT

To amend Section 37-1-80, Code of Alabama 1975, relating to rates charged by public utilities, so as to provide a procedure to be used by the Public Service Commission to determine if the purchase of out of state or foreign coal will alter an electric utility's rates and to prohibit the use of foreign coal to serve certain state facilities.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Section 37-1-80, Code of Alabama 1975, is hereby amended to read as follows:

"§ 37-1-80.

"*(a)* The rates and charges for the services rendered and required shall be reasonable and just to both the utility and the public. Every utility shall be entitled to such just and reasonable rates as will enable it at all times to fully perform its duties to the public and will, under honest, efficient and economical management, earn a fair net return on the reasonable value of its property devoted to the public service. For the purpose of fixing rates, such reasonable value of a public utility's property shall be deemed to be the original cost thereof, less the accrued depreciation, as of the most recent date available. In any determination of the commission as to what constitutes such a fair return, the commission shall give due consideration among other things to the requirements of the business with respect

to the utility under consideration, and the necessity, under honest, efficient and economical management of such utility, of enlarging plants, facilities and equipment of the utility under consideration, in order to provide that portion of the public served thereby with adequate service.

"(b) Any electric utility subject to regulation by the commission which has purchased coal not mined within the state of Alabama, shall submit a petition on a quarterly basis to the commission requesting that the cost of purchasing and using said coal be considered by the commission as an allowable expense or cost in any system of calculation implemented by the commission to establish rates or in any hearing to determine rates. The petition shall be presented in affidavit form and shall set forth the cost of such coal, the identity of the producer of such coal, the quantity of such coal stated in tons, the average BTU content of such coal, the average sulphur and ash content of such coal, the cost of transportation to be incurred by the electric utility in relation to such coal, and such other information as the commission may deem necessary. The petition shall be open to the public and available for inspection immediately upon its submission to the commission. After receipt of the petition, the commission shall conduct public hearings on a quarterly basis to determine whether the cost of the coal purchased is fair and reasonable in relation to coal otherwise available and produced within the state of Alabama. The burden of proof shall be upon the electric utility submitting the petition. The proof required shall be clear and convincing evidence.

"(c) In the event that the commission determines by clear and convincing evidence taken at the quarterly hearing that the cost of coal so purchased is fair and reasonable in relation to coal otherwise available and produced within the state of Alabama, it shall grant the rate relief requested. In the event that the commission determines that the utility has not provided by clear and convincing evidence that the cost of the coal so purchased is fair and reasonable in relation to coal otherwise available and produced within the state of Alabama, it shall deny the petition and shall disallow in any proceeding or calculations concerning the setting of rates any charges attributable to coal so purchased.

"(d) In comparing the cost of the coal so purchased with the coal otherwise available and produced within the state of Alabama, the commission may not consider as relevant any portion of the cost of coal produced in the state of Alabama which is attributable to standards imposed upon coal producers by virtue of the federal [sic] Surface Mining Control and Reclamation Act of 1977, or the Federal Mine Safety and Health Act of 1977, or other applicable federal or state laws if substantially identical standards are not imposed upon the producer of the coal so purchased.

"(e) In determining whether the cost of the coal purchased is fair and reasonable, the commission shall take into account the benefits derived by customers of the electric utility from revenues to the state of Alabama and to its political subdivisions from the production of coal within the state of Alabama.

"(f) No utility which provides electricity or heat to a state-owned facility shall use coal mined in a foreign country for the purpose of generating electricity or providing heat. As used herein, the phrase 'stated-owned facility' means a building, factory, or other structure owned by the State [sic] of Alabama or by any agency, authority, board, department, school, college, university, county, municipality or other governmental entity organized or constituted pursuant to the laws or ordinances of the State of Alabama or of a subdivison, county or municipality thereof.

"(g) The commission shall promulgate all rules and regulations necessary to implement this section and to provide for the participation of all interested parties. Any person or entity may intervene and participate in any hearing described herein or held pursuant to this act."

Section 2. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

1987 ARK. ACTS 553

For An Act To Be Entitled

"AN ACT TO REQUIRE ALL ELECTRIC UTILITIES IN ARKANSAS SELLING ELECTRICITY TO CONSUMERS IN ARKANSAS AND OPERATING COAL-FIRED ELECTRIC GENERATING PLANTS IN ARKANSAS TO BURN A MIXTURE OF COAL CONTAINING A MINIMUM AMOUNT OF ARKANSAS-MINED COAL; TO PROHIBIT AN INCREASE IN COST TO CONSUMERS; TO REQUIRE THE REPORTING OF THE AMOUNTS AND COSTS OF ALL COAL BURNED FOR GENERATING ELECTRICITY IN ARKANSAS; AND FOR OTHER PURPOSES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. On and after Janury 1, 1988, to the extent that it is technically, economically and environmentally feasible, all electric utilities in Arkansas providing electric power for sale to consumers in Arkansas and generating electric power from coal-fired plants located in Arkansas shall burn a mixture of coal that contains a minimum of:

(A) three percent (3%) Arkansas-mined coal as calculated on a BTU (British Thermal Unit) basis from January 1, 1988 until December 31, 1988;

(B) six percent (6%) Arkansas-mined coal as calculated on a BTU (British Thermal Unit) basis from January 1, 1989 until December 31, 1989; and

(C) ten percent (10%) Arkansas-mined coal as calculated on a BTU (British Thermal Unit) basis each calendar year after January 1, 1990.

SECTION 2. (A) No electric utility shall be required to comply with this Act if to do so would result in increasing the cost of electricity to its consumers over the cost incurred to serve them under existing or alternative coal purchase arrangements. Types of increased costs to be considered in addition to the cost of the coal include, but are not limited to, plant modifications, additional coal handling facilities, additional environmental cost necessary to burn Arkansas coal, or any other costs or penalties which may be incurred as a result of burning Arkansas coal.

(B) No public utility shall be required to comply with this Act if to do so would result in the utility exceeding any of its State or federal [sic] air quality omission standards or any other conditions of its environmental permits.

(C) No public utility shall be required to comply with the provisions of this Act if to do so would result in the utility being unable to fulfill any existing contractual commitments for the purchase of coal or result in the purchase of a quantity of Arkansas coal above the amount the utility can utilize.

SECTION 3. It shall be the responsibility of the Arkansas Public Service Commission to enforce compliance with the requirements of this Act.

SECTION 4. All laws and parts of laws in conflict will [sic] this Act are hereby repealed.